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No. 83-6043

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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ROBERT A. WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether an indictment that charges impersonation of a government employee in the language of 18 U.S.C. 912 nevertheless must be dismissed because it fails expressly to allege an intent to defraud.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 83-6043

DAVID A. KILLEA, PETITIONER

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OPINION BELOW

The opinion of the court of appeals as amended (Pet. App. 1a1-1a14, 2a1-2a3) is reported at 732 F.2d 1154.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1984. The petition for a writ of certiorari was filed on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of falsely pretending to be an employee of the United States and acting as such (count 1), and falsely pretending to be an employee of the United States and obtaining money in that character (counts 2-11), in violation of 18 U.S.C. 912. He was sentenced to concurrent sentences of 18 months' imprisonment on counts 1 and 2, sentence on the remaining counts was suspended in favor of five years' probation.

1. The evidence showed that on numerous occasions petitioner telephoned Raymond Bender, a disabled veteran, and

falsely identified himself as an employee of the Social Security administration named "Jack Williams." During these calls petitioner declared that Bender had received overpayments of disability benefits, and informed Bender that he would have to refund a portion of the payments to remain eligible for future benefits. After each of these conversations petitioner visited Bender at his home, claimed to be Jack Williams, and demanded that Bender give him cashier's checks in the amounts of the "overpayments," payable to Herbert A. Williams. Using this method petitioner obtained payments in amounts ranging from $50 to $125 (Pet. App. 2a)-(3a).

Bender's employer ultimately became suspicious of petitioner and filed a complaint with the Federal Bureau of Investigation. With Bender's consent, FBI agents recorded a December 20, 1982 telephone conversation between Bender and a person identifying himself as Jack Williams. During the conversation the caller told Bender that he had to repay $50. The following day petitioner arrived at Bender's residence claiming to be Jack Williams. He collected the $50 and was arrested on the scene by FBI agents (Pet. App. 3a).

2. Petitioner was indicted on 11 counts of violating Section 912. The first count of the indictment alleged that petitioner "did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof * * * and did falsely take upon himself to act as such" (Pet. App. 28). The remaining 10 counts declared that petitioner "did falsely pretend to be an officer and employee of the United States acting under the authority thereof * * * and in such pretended character did obtain" various sums from Bender (Pet. App. 3a)-(5a). At the close of the government's case petitioner moved the district court to dismiss the indictment for failure specifically to charge "intent to defraud." The motion was

denied, and the jury returned a verdict of guilty on all 11 counts (Pet. App. 1a4).

On appeal petitioner challenged the denial of the motion to dismiss. The court of appeals affirmed, explaining that Section 312 does not in terms require an intent to defraud. While noting that the Fifth Circuit has ruled that intent to defraud must expressly be charged in a Section 312 indictment, [1] the court below concluded "that 'intent to defraud' * * * could reasonably have been considered by Congress to be present whenever the elements retained in section 312 are present" (Pet. App. 1a12). The court of appeals therefore held that "the statutory language contains the necessary elements of the offense and an indictment alleging all of the necessary elements is sufficient" (Pet. App. 1a13). In reaching this conclusion the Third Circuit aligned itself with the six other Circuits that do not require a Section 312 indictment specifically to charge intent to defraud, so long as the indictment tracks the statutory language. [2]

ARGUMENT

1. The controversy in this case concerns the 1968 revision of section 472. Prior to that year, conviction under 18 U.S.C. 76 (1940), the predecessor to Section 312, expressly required an "intent to defraud either the United States or any person." In 1945, however, in United States v. Lemaster, 328 U.S. 746 (1946), this Court upheld the validity of an indictment under Section 312's predecessor that did not specifically allege an intent to defraud, explaining that "the words 'intent to

[1] United States v. Tannian, 464 F.2d 367 (5th Cir. 1972); Brown v. United States, 364 F.2d 748 (5th Cir. 1966).

[2] United States v. Dark, 531 F.2d 1323 (7th Cir. 1976); United States v. Bullock, 517 F.2d 994 (9th Cir. 1975); United States v. Brown, 518 F.2d 932 (D.C. Cir. 1975); United States v. Ward, 512 F.2d 12 (2d Cir. 1974), vacated on other grounds, 423 U.S. 1011 (1975); United States v. Briggs, 458 F.2d 452 (6th Cir.), cert. denied, 409 U.S. 863 (1972); United States v. Sansone, 457 F.2d 548 (4th Cir. 1967).

defraud,' in the context of this statute, do not require more than that the defendants here, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct" (id. at 704). When the criminal code was revised in 1948 the "intent to defraud" language was deleted from what became Section 912, so that the statute now reads:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States * * * and [1] acts as such, or [2] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both. 1/

According to the Historical or Revision Notes, "[t]he words 'with the intent to defraud the United States or any person' * * * were omitted [from the revised section] as meaningless in view of" Logowitch. Legislative Note, 18 U.S.C. 912.

In subsequent decisions the Fifth Circuit declared that, despite the 1948 revision, intent to defraud remained an "essential element" of both Section 912[1] and Section 912[2], and therefore had to be alleged in an indictment under those provisions. United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972); Bones v. United States, 344 F.2d 796, 803 (5th Cir. 1965). The court below, in contrast, concluded "that 'intent to defraud' as defined by Logowitch" exists "whenever the elements retained in section 912 are proven," so that "an indictment alleging violations of [Section 912] need not specifically allege an intent to defraud" (Pet. App. 1a12). Petitioner maintains that the ruling below cannot be reconciled with the Fifth Circuit decisions.

1/ In conformity with the practice of the courts of appeals, bracketed numbers have been inserted within the statutory text to identify the two offenses created by Section 912. See Pet. App. 1a5 n.2; United States v. Rosser, 528 F.2d 652, 654 n.4 (D.C. Cir. 1976).

2. In fact, however, the disagreement between the courts of appeals about Section 912 is semantic rather than substantive, because the court below and the Circuits that it followed accord essentially the same meaning to the statute as does the Fifth Circuit. Thus the Fifth Circuit's definition of fraudulent intent for purposes of clause [1] of Section 912 echoes Lepowitch: it is "the intent by artifice and deceit to cause another to follow some course he would not have pursued but for the deceitful conduct." Randolph, 460 F.2d at 370. That court also has defined the requisite mental state for a violation of clause [2] as "an intent to wrongfully deprive another of property." Howes, 344 F.2d at 803.

Despite petitioner's suggestion to the contrary, the other courts of appeals, including the court below, essentially have embraced the same definitions of the mental element of a Section 912 violation. While these courts do not require that a Section 912 indictment specifically allege intent to defraud, as does the Fifth Circuit, they take this position only because they have concluded that a person who commits the acts described in the statute necessarily has such an intent -- and they define that intent in terms very similar to those used by the Fifth Circuit.

So far as Section 912[1] is concerned, for example, the District of Columbia Circuit explained, in language identical to that used by the Fifth Circuit, that "virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting 'as such' seeks 'to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.'" United States v. Foster, 528 F.2d 652, 656 (D.C. Cir. 1976), quoting Lepowitch, U.S. at 704. Similarly, the Seventh Circuit noted in a case under Section 912[2] that "where one is deceived into giving up something of value, as required by the second part of the

statute, it is * * * implausible that the purpose is pure. Thus there need be no allegation of fraudulent intent since allegation of acts sufficient to violate part two [of Section 912] would satisfy the Isgouith definition." United States v. Dard, 654 F.2d 490, 492 (7th Cir. 1981). The decision below accepted these readings of the statute, declaring that "[a]n intent to defraud as defined in Isgouith is present for a section 912[1] offense whenever the element of 'acting as such' is proven * * * . Similarly, an intent to defraud is present for purposes of a section 912[2] offense whenever one demands or receives money * * * in 'pretended character,' acting under the authority of the United States" (Pet. App. 1a12-1a13). Thus there is no basic disagreement between the Fifth Circuit and the court below either about the meaning of Section 912 or about the type of conduct that amounts to a violation of the statute. 5/

Similarly, the concerns that led the Fifth Circuit to require that intent to defraud be alleged in the indictment are satisfied by the reading given the statute in this case. There is no danger that Section 912[1] will be used to punish "a[e]re foolish threats" (Randolph, 460 F.2d at 370), because that provision has been interpreted to apply only to persons who "'seek[] "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct"'" (Pet. App. 1a11, quoting Hosser, 520 F.2d at 656, in turn quoting

5/ While the Fifth Circuit maintains that intent to defraud remains an element of a Section 912[1] violation, it does not require for conviction that the defendant have attempted to extract something of value from the victim; it is enough that the defendant attempted to change the victim's course of conduct. See Randolph, 460 F.2d at 370; compare Hosser, 520 F.2d at 656. Conversely, while other Circuits suggest that the 1948 revision of the criminal code removed intent to defraud as an element of Section 912[2] (see Dard, 654 F.2d at 492), those courts nevertheless agree that "the second part of the statute clearly requires that money * * * or other things of value be gotten because of the [defendant's] pretense," and therefore that "the victim has been deceived into giving them" (ibid. (emphasis in original)). Compare Hosser, 520 F.2d at 655.

Leyneliah, 318 U.S. at 704). And an indictment cast in the language of Section 912[2] adequately "apprise[s] the defendant of what he will have to meet" (Hanes, 344 F.2d at 104), because that language was read by the court below to "contain[] the necessary elements of the offense" (Pet. App. 1a13) -- including the element of "'intent to defraud' as defined by Leyneliah" (Pet. App. 1a12).

The omission of an intent to defraud allegation from the indictment therefore had no effect in this case. The indictment "track[ed] the statutory language" (Pet. App. 1a14), thus essentially accusing petitioner both of "seek[ing] 'to cause [Bender] to follow some course of would not have pursued'" (Foster, 528 F.2d at 656, quoting Leyneliah, 318 U.S. at 704), and of "deceiving [him] into giving up something of value" (Ford, 654 F.2d at 492). The indictment also outlined a complex scheme on petitioner's part to obtain money from Bender under false pretenses. 1/ Plainly, an indictment cast in these terms accused petitioner of engaging in more than "bravado," and fully apprised him of the government's allegations.

The addition of the words "intent to defraud" would not have changed the substance of the allegations or made petitioner aware of an element of the government's case that otherwise took him by surprise. Because any disagreement between the Fifth Circuit and the court below over the proper form of a Section 912 indictment therefore does not present an issue of significance, review of this case is unwarranted.

1/ The indictment alleged that petitioner "falsely identified himself to Raymond Bender as an employee of the Social Security administration and falsely informed him that payments of Social Security benefits had been made to him in excess of the amounts to which the said Raymond Bender was lawfully entitled" (Pet. App. 1a1). The indictment went on to allege that while in this "pretended character" petitioner obtained various sums from Bender (Pet. App. 1a2-1a11).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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